

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**G2 SECURE STAFF, LLC**

**and**

**Case 12-CA-111844**

**LOCAL 32BJ SERVICE EMPLOYEES  
INTERNATIONAL UNION, CTW, CLC**

**ORDER<sup>1</sup>**

The Employer's petition to revoke Subpoena B-737529 is denied. The subpoena seeks information relevant to the matter under investigation and describes with sufficient particularity the evidence sought, as required by Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations.<sup>2</sup> Further, the Employer has failed to establish any other legal basis for revoking the subpoena. See generally *NLRB v. North Bay*

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<sup>1</sup> The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

<sup>2</sup> Member Johnson agrees, for institutional purposes and recognizing the lack of three votes for a change in the law, that the Employer's petition to revoke should be denied. To begin, he recognizes that the Board has previously held that the possibility that the Board lacks jurisdiction over a party does not warrant revocation of an otherwise valid subpoena. See *Eulen America*, Case 12-CA-26948, order issued July 25, 2011, 2011 WL 3098547 at fn. 2 (denying petition to revoke where the employer asserted that it was covered by the Railway Labor Act). Further, Member Johnson understands that the matter in this case has earlier been referred to the NMB to decide on RLA jurisdiction, and the NMB has not acted either during the pendency of this subpoena matter before the Board, or at any time earlier. In those circumstances, it is his view that Section 3(d) of the Act vests the General Counsel with sufficient independent discretionary authority to make an initial determination whether there is jurisdiction under the Act, as opposed to RLA jurisdiction, in order to pursue the investigation and processing of an unfair labor practice charge, with the ultimate question of whether a complaint should issue. However, Member Johnson notes that Section 3(d) does not diminish the Board's statutory authority in determining whether or not a petition to revoke an investigatory subpoena should be granted on the ground of burdensomeness or any other relevant ground. In harmonizing those two statutory authorities, Member Johnson would require the General Counsel to avoid burdening a party with responding to document requests that reasonably appear on their face to relate to solely the merits of an unfair labor practice allegation, where no such jurisdictional determination has yet been made. Accordingly, if his view were to apply to the instant case instead of the current institutional view under extant law, he would grant the petition to revoke as to paragraphs 1, 2, and 4 through 6 of the subpoena here on the grounds of burdensomeness and deny it in respect to all other paragraphs and grounds.

*Plumbing, Inc.*, 102 F.3d 1005 (9th Cir. 1996); *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507 (4th Cir. 1996).<sup>3</sup>

Dated, Washington, D.C., March 25, 2015.

MARK GASTON PEARCE, CHAIRMAN

HARRY I. JOHNSON, III, MEMBER

MEMBER MISCIMARRA, dissenting

I would grant the petition to revoke in the circumstances presented here, where

(i) Respondent has raised a substantial question regarding the absence of Board jurisdiction in view of Respondent's position that it is subject to the Railway Labor Act (RLA) and, thus, is not an "employer" as defined in Sec. 2(2) of the National Labor Relations Act (NLRA); and

(ii) where the subpoenaed information is unrelated to the question of jurisdiction. Cf. *EEOC v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1076-77 (9th Cir. 2001); *Reich v. Great Lakes Indian Fish & Wildlife Comm.*, 4 F.3d 490, 491 (7th Cir. 1993). I note that NLRB Region 20 in 2013 – based on a determination that Respondent was an RLA employer – dismissed an NLRB charge "because of the Board's lack of jurisdiction." Therefore, I would grant the petition to revoke as to the subpoena in its entirety, but without prejudice to a subpoena limited to the question of Board jurisdiction or a subpoena issued after a determination by the Regional Director, in the first instance, that Respondent is an "employer" subject to the NLRA.

Dated, Washington, D.C., March 25, 2015.

PHILIP A. MISCIMARRA, MEMBER

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<sup>3</sup> The Employer's request that its petition to revoke be made part of the official record in this case is denied as premature, without prejudice to the Employer renewing this request if these investigative proceedings progress to the stage where an official record is created.